

John A. Kawai, SBN 260120  
 CARPENTER, ZUCKERMAN & ROWLEY  
 407 Bryant Circle, Suite F,  
 Ojai, CA 93023  
 Tel: (805) 272-4001  
 Fax: (805) 719-6858  
 Email: [jk@czrlaw.com](mailto:jk@czrlaw.com)  
 Of Attorneys for Plaintiffs

Deborah A. Bianco, Pro Hac Vice  
 14535 Bel-Red Road, #201  
 Bellevue, WA 98007  
 (425) 747-4500  
 Email: [deb@debbiancolaw.com](mailto:deb@debbiancolaw.com)  
 Attorney for Plaintiffs Maureen, Pia,  
 And Mya

Carol L. Hepburn, Pro Hac Vice  
 200 First Avenue West, #550  
 Seattle, WA 98119  
 Tel: 206) 957-7272  
 Fax: (206) 957-7273  
 Email: [carol@hepburnlaw.net](mailto:carol@hepburnlaw.net)  
 Attorney for Plaintiffs Lily, Sarah,  
 Skylar, Savannah, Sally, Sierra, Violet,  
 Amy, Erika, Tori, Jenny, and Jessica

**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 OAKLAND DIVISION**

“Amy” et. al.,

Plaintiffs,

v.

RANDALL STEVEN CURTIS

Defendant.

Case Number: 4:19-CV-02184PJH

PLAINTIFFS’ NOTICE OF MOTION AND  
 PLAINTIFFS’ MOTION TO STRIKE  
 SUPPLEMENTAL DECLARATION OF  
 DEFENDANT FILED SEPTEMBER 25,  
 2020 OR PORTIONS THEREOF

NOTE ON MOTION CALENDAR:

Date: November 2, 2020

Time: 9:00 a.m.

Judge: Honorable Phyllis J. Hamilton

Chief United States District Court Judge

PLAINTIFFS’ NOTICE OF MOTION AND MOTION  
 TO STRIKE SUPPLEMENTAL DECLARATION OF  
 DEFENDANT FILED SEPTEMBER 25, 2020  
 OR PORTIONS THEREOF - 1

CASE NO.: 4:19-cv-02184-PJH

**PLAINTIFF'S NOTICE OF MOTION**  
**AND MOTION TO STRIKE SUPPLEMENTAL DECLARATION OF DEFENDANT**  
**FILED ON SEPTEMBER 25, 2020 OR PORTIONS THEREOF**

PLEASE TAKE NOTICE that on November 2, 2020, 2020, at 9:00 a.m. or as soon thereafter as this matter may be heard,

Plaintiffs move the Court, pursuant to Local Rules 7-5 and 7-3(d), for an Order Striking Defendant's Supplemental Declaration (Dkt #120) or Portions Thereof (filed of September 25, 2020 at 5:20 pm) on the grounds that it is irrelevant in its entirety, or that portions of the Declaration are hearsay, mere speculation, or contain argument or are untimely.

This motion is based on this Notice of Motion, the following Memorandum of Points and Authorities, the complete files and records in this action and any other matters that may properly come before the Court for its consideration.

Dated: September 28, 2020.

CARPENTER, ZUCKERMAN, & ROWLEY

By s/ John A. Kawai

John A. Kawai, SBN 260120

407 Bryant Circle, Suite F

Ojai, California 93023

Phone: 805-272-4001

Email: jk@czrlaw.com

CAROL L. HEPBURN, P.S.

By /s Carol L. Hepburn

Carol L. Hepburn, *Pro Hac Vice Admitted*

PO Box 17718

Seattle, Washington 98127

Phone: 206-957-7272

Email: carol@hepburnlaw.net

DEBORAH A. BIANCO, P.S.

By /s Deborah A. Bianco

Deborah A. Bianco, *Pro Hac Vice Admitted*

14535 Bel-Red Road, #201

Bellevue, Washington 98007

Attorneys for Plaintiffs

PLAINTIFFS' NOTICE OF MOTION AND MOTION  
TO STRIKE SUPPLEMENTAL DECLARATION OF  
DEFENDANT FILED SEPTEMBER 25, 2020  
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TO STRIKE SUPPLEMENTAL DECLARATION OF  
DEFENDANT FILED SEPTEMBER 25, 2020  
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**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

The contents of Supplemental Defendant's Declaration of Ethan A. Balogh, (Dkt. #120) filed September 25, 2020, is of no relevance to the Plaintiffs' Motion to Strike Affirmative Defenses currently pending. Should the court find some relevance in the Declaration, nevertheless some portions of the Declaration are hearsay and other portions are pure speculation. Attached hereto at Exhibit 1 is a true and correct copy of the Supplemental Declaration with the portions to which Plaintiffs make individualized objections highlighted. The Supplemental Declaration is further untimely as to the pending Motion to Strike Affirmative Defenses.

**II. BACKGROUND**

Plaintiffs filed their Reply (Dkt. #111) on the Motion to Strike Defendant's Affirmative Defenses on September 17, 2020. Shortly, thereafter Plaintiffs' counsel Hepburn was informed by AUSA Julie Garcia, who represented the Government in the underlying criminal matter with regard to restitution, that she had a concern that Plaintiffs' filing would be read by this court to say that she had violated Plaintiffs' rights under the Crime Victims Rights Act. Plaintiffs' counsel had no such intent to convey an allegation of improper actions on the part of Ms. Garcia. Plaintiffs' counsel filed her Supplemental Declaration (Dkt. #112) on September 18, 2020 in order to clarify for the record, should there be any question, that no such allegation was being made.

Defendant has now filed at Docket Entry #120 a Supplemental Declaration in support of Defendant's Response (ECF 108-1) to Motion to Strike Affirmative Defenses challenging the veracity of Plaintiffs' counsel's assertions and alleging withholding of emails which should have been produced in discovery. Defendant further alleges that such "withheld" emails are germane to the currently pending Motion to Strike Affirmative Defenses.

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### III. LEGAL STANDARD

“Irrelevant evidence is not admissible.” F.R.E. 402.

Local Rule 7-5 provides that Affidavits or Declarations must contain only facts, must conform to the requirements of Fed. R. Civ. P. 56(e), and avoid argument and conclusions.

Hearsay is inadmissible. F.R.E. 802.

Local Rule 7-3(d) provides that:

**Supplementary Material.** Once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval, except as follows:

**(1) Objection to Reply Evidence.** If new evidence has been submitted in the reply, the opposing party may file and serve an Objection to Reply Evidence, which may not exceed 5 pages of text, stating its objections to the new evidence, which may not include further argument on the motion. The Objection to Reply Evidence must be filed and served not more than 7 days after the reply was filed. Fed. R. Civ. P. 6(d), which extends deadlines that are tied to service (as opposed to filing), does not apply and thus does not extend this deadline.

### IV. DISCUSSION

#### A. The Declaration Lacks Relevance.

Defendant offers the Supplemental Declaration in support of his Response to the Plaintiffs’ Motion to Strike Affirmative Defenses. He now alleges withholding of documents in discovery that he claims are pertinent to the pending issues.

Defendant’s Supplemental Declaration contains nothing of relevance to the issues about whether the affirmative defenses contained in his Answer to the First Amended Complaint herein are sufficiently pleaded or legally sufficient. Rather, it is further effort to “stir the pot” and gin

up discord between counsel for Plaintiffs' and counsel for the Government in the underlying criminal matter.

Defendant is injecting a discovery issue into the pending motion concerning affirmative defenses. Defendant has alerted Plaintiffs to his concern that further emails need be produced in response to his Request for Production of Documents evidencing communications with third parties concerning Defendant. Plaintiffs' counsel are attempting to attend to this inquiry. (See Decl. of Carol L. Hepburn filed herewith). Arguably, given the Magistrate's Order of September 8, 2020, Defendant has no right to this information in any event. If there is a discovery concern then the Local Rules give the parties a method for resolving it. Conflating such an issue with the pending motion through a supplemental post-Reply Declaration is not the way to do this.

Finally, the emails at Exhibit E and letter at Exhibit F were all available to Defendant at the time of filing his Response to the Motion to Strike Affirmative Defenses (Dkt. #. 107), and have no relevance to proper pleading or legal sufficiency.

Plaintiffs' Supplemental Declaration was filed for one reason and one reason only. An attorney practicing before this court felt that a memorandum filed by the Plaintiffs called her conduct into question. The Supplemental Declaration was filed to make clear that such was not the case. Defendant however views this as an opportunity to inject more argument, and improper evidence, into the record. The Declaration filed at Dkt. #120 should thus be stricken in whole.

#### **B. Hearsay**

Should the court determine that the Docket #120 Supplemental Declaration of Defendant is not improper as a whole, certain portions of it should nevertheless be stricken as in violation of the Rules of Evidence and Local Rules 7-3(d) and 7-5.

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At the top of page 2 of the Supplemental Declaration begins to recite what counsel was allegedly told by AUSA Garcia. It is offered for the truth of the matter asserted. It fails to fit within any exception to the hearsay rules. See F.R.E. 803. This portion should be stricken. (See Ex. 1 p.2, ll.3-15).

**C. Argument contained in the Supplemental Declaration.**

At page 3, lines 3 to 17, the Supplemental Declaration consists of a request that Plaintiffs' counsel should produce further emails, a statement purporting to explain what is in the attached Exhibit 1 and the argument that it is relevant to the pending motion. These are not facts and should be stricken. (See Exhibit 1 p. 3, ll. 3-17).

**D. The Supplemental Declaration attempts to place additional, untimely and improper documents into evidence.**

Exhibit E consists of emails produced to Plaintiffs in discovery weeks ago. Exhibit F to the Supplemental Declaration is a letter of January 24, 2018 sent from Plaintiffs' counsel to Defense co-counsel during the underlying criminal case. No reason is offered as to why the emails and this letter were not available to Defendant to include with his Response to the Motion to Strike Affirmative Defenses. The offer of both these exhibits is untimely (Local Rule 7-3(d)). (See Ex. 1, ¶¶5 and 6).

Further, the letter is an offer of compromise of the claims asserted in this civil matter and is offered to disprove the validity of the claims. The letter is therefore inadmissible and should be stricken pursuant to F.R.E. 408.

**V. CONCLUSION**

For the reasons stated above, Plaintiffs respectfully request that the Court grant this motion to strike defendant's supplemental declaration or portions thereof.

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1 Dated: September 28, 2020.

CARPENTER, ZUCKERMAN, & ROWLEY

2 By s/ John A. Kawai

3 John A. Kawai, SBN 260120

4 407 Bryant Circle, Suite F

Ojai, California 93023

5 Phone: 805-272-4001

Email: jk@czrlaw.com

6 CAROL L. HEPBURN, P.S.

7 By /s Carol L. Hepburn

8 Carol L. Hepburn , Pro Hac Vice

9 200 First Ave. West, Suite 550

10 Seattle, Washington 98119

11 Phone: 206-957-7272

12 Fax: 206-957-7273

13 Email: carol@hepburnlaw.net

14 Of Attorneys for Plaintiffs Lily, Sarah, Skylar,

15 Savannah, Sally, Sierra, Violet, Amy, Erika, Tori,

16 Jenny, and Jessica

17 DEBORAH A. BIANCO, P.S.

18 By /s Deborah A. Bianco

19 Deborah A. Bianco, Pro Hac Vice

20 14535 Bel-Red Road, #201

21 Bellevue, Washington 98007

22 Of Attorneys for Plaintiffs Maureen, Pia, and Mya

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 28, 2020, I caused a copy of the foregoing to be served upon parties of record via the Court's ECF system.

CARPENTER, ZUCKERMAN, & ROWLEY

By s/ John A. Kawai  
John A. Kawai, SBN 260120  
407 Bryant Circle, Suite F  
Ojai, California 93023  
Phone: 805-272-4001  
Email: [jk@czrlaw.com](mailto:jk@czrlaw.com)

CAROL L. HEPBURN, P.S.

By /s Carol L. Hepburn  
Carol L. Hepburn, Pro Hac Vice  
200 First Ave. West, Suite 550  
Seattle, Washington 98119  
Phone: 206-957-7272  
Fax: 206-957-7273  
Email: [carol@hepburnlaw.net](mailto:carol@hepburnlaw.net)  
Of Attorneys for Plaintiffs Lily, Sarah, Skylar,  
Savannah, Sally, Sierra, Violet, Amy, Erika, Tori,  
Jenny, and Jessica

DEBORAH A. BIANCO, PLLC

By /s Deborah A. Bianco  
Deborah A. Bianco, Pro Hac Vice  
14535 Bel-Red Road, #201  
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